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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-682

SANTA CLARA PUEBLO, et al.,
Petitioners,

v.

JULIA MARTINEZ, et al.,
Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

QUESTIONS PRESENTED

1. Do the federal district courts have jurisdiction to grant equitable relief against Indian tribes for violations of the Indian Civil Rights Act?

2. Does a tribal rule barring from membership the children of mixed marriages of female members, but mandating membership for the children of mixed marriages of male members, violate 25 U.S.C. §1302(8), which prohibits an Indian tribal government from denying equal protection of its laws or due process of law?

STATEMENT OF THE CASE

Pursuant to Rule 40.3, respondents' statement is limited to those points necessary to correct inaccuracies and omissions in petitions' brief.[1]

[1]Hereinafter all references to "respondents" will be stated "plaintiffs" and all references to "petitioners" stated "defendants," except references to Petitioners' Brief.

Plaintiff Julia Martinez is a full-blooded Santa Clara Indian, a member and lifelong resident of the Pueblo. Her husband, Myles Martinez, is a full-blooded Navajo Indian and has resided at the Santa Clara Pueblo since his 1941 marriage to Julia, except for his military service in World War II. Their children, plaintiff Audrey Martinez and her brothers and sisters, are thus of full Indian ancestry and half Santa Clara ancestry. They are lifelong Pueblo residents except for time away at school. All the Martinez children speak and understand Tewa, the traditional and official language of the Pueblo; observe traditional customs; and are accepted into the ancient religion of the Pueblo.

These facts led the district court to find that the Martinez children "are culturally, for all practical purposes, Santa Clara Indians." 402 F.Supp. at 18, Pet. 26a. The Court of Appeals concluded that they "are, culturally, members of the Pueblo." 540 F.2d at 1041, Pet. 31a.

Contrary to defendents' claim that Santa Clara Pueblo is a traditional theocracy, the district court found that ". . . the present Pueblo government is neither wholly traditional nor wholly anglicized." 402 F.Supp. at 13, Pet. 15a. The constitution of the Pueblo was adopted in 1935 pursuant to the Indian Reorganization Act, 25 U.S.C. §476. Power to determine membership questions is granted by the Pueblo Constitution to the Tribal Council. A. 1-7.

Membership determinations by the Council affect a wide range of rights, both tribal and federal. Only Pueblo members have tribal political rights, enjoy material benefits such as land use rights, and have the right to remain living at the Pueblo. 402 F.Supp. at 14, Pet. 17a-18a. Many federal benefits are expressly contingent upon membership in an Indian tribe, for example, preference in certain federal employment (*Morton v. Mancari*, 417 U.S. 535 (1974), 25 C.F.R. §§277.3(h), 277.28, 275.2(g)); participation

in the Indian Business Development Program (25 C.F.R. §§80.1(e), 80.3), the Indian Revolving Loan Fund (25 C.F.R. §§91.1(c), 91.3(a)), the Loan Guaranty, Insurance and Interest Subsidy Program (25 C.F.R. §§93.1(c), 93.8); and special federal educational benefits (25 C.F.R. §§273.2(j), 273.12).

Denial of membership has caused hardship to the Martinez family, especially in obtaining federal medical care available to Indians. In 1968 Julia Martinez's now-deceased daughter Natalie, sufflering from strokes associated with her terminal illness, was refused emergency medical treatment by the Indian Health Service. This was solely because her mother had previously been unable to obtain tribal recognition for her. Only after meeting with Interior Department solicitors did Mrs. Martinez obtain Bureau of Indian Affairs census numbers for her children. Tr. 15-17, 46-48, 50-51.[ii] At the time of trial the Martinez children were encountering no difficulties in receiving medical care, as defendants have noted. Since then, however, Martinez grandchildren have had problems in obtaining medical care from the Indian Health Service.

Those of the Martinez children who are grown are unable to obtain Pueblo land assignments upon which to make homes of their own. To stay on the Pueblo, they must reside with their mother or other member relative.

Defendants claimed at trial that the 1939 Pueblo Ordinance is essential to the religious heritage of the Pueblo, but the district court found that it is unrelated to the Pueblo religion. 402 F.Supp. at 16, Pet. 21a.

The traditional Santa Clara society frowned on mixed marriages by either sex (Tr. 165, 188), and prior to the 1930's mixed marriages at the Pueblo were rare. Tr. 165,

[ii]Because there is no consecutive pagination of the Record as a whole, citations to the reporter's transcript are cited herein as "Tr."

188; R. vol. II Pl. Ex. 1 p. 29 (Tr. 255).[iii] The few cases of children of such marriages were handled case-by-case based on cultural and religious affinity to the Pueblo. 402 F.Supp. at 16, Pet. 21. This traditional rule is codified in the Pueblo Constitution of 1935, which mentions no discrimination. A.2. The principal purpose of the 1939 Ordinance was to reduce claimants to Pueblo land and money. 540 F.2d at 1047, Pet. 44a; 402 F.Supp. at 15, Pet. 20a. As late as 1942, the Pueblo contemplated exceptions to the Ordiance upon payment of a fee. R. vol. II Pl.Ex. 15 (Tr 335). Based on these facts, the district court stated that the Ordinance represented a "break with tradition." 402 F.Supp. at 16, Pet. 21a. The Ordinance, which mandates the membership of male-line children without regard to cultural or religious affinity, is thus not a traditional rule as defendants claim.

SUMMARY OF ARGUMENT

The district court had jurisdiction to award plaintiffs equitable relief, and tribal sovereign immunity does not defeat jurisidiction. All four circuit courts of appeals that have reviewed actions arising under the ICRA have so ruled. The legislative history demonstrates that the purpose of the ICRA is to guarantee to persons under tribal jurisdiction the same constitutional rights enjoyed by other Americans.

Remedies under the ICRA cannot be limited to habeas corpus. Many of the rights enumerated in the Act would never arise in the context of tribal custody and would thus be unenforceable. The rights conferred on individual Indians would thus be greatly inferior to the rights enjoyed

[iii] Plaintiffs' exhibits 1-3 were offered and admitted at points noted in the transcript. All other plaintiffs' exhibits were offered at Tr. 335, but the district court elected to hold a separate proceeding in chambers after the trial at which the other exhibits were admitted. The record does not include a transcript of this proceeding.

by others, contrary to Congress' intent. The legislative history demonstrates specific congressional concern with the denial of an equitable remedy by the federal courts in cases involving tribal membership, free exercise of religion, and tribal taxing power. By contrast there is no support in the history for an intent to confine remedies to habeas corpus. Relevant decisions of this Court sustain the jurisdiction of the district courts over analogous cases denying basic rights. For many years the remedy of habeas corpus has been broadly governed by statute, while the equitable powers of the federal courts have not except for specific limitations. Congress followed this tradition in the ICRA.

Tribal sovereign immunity as a bar would defeat the same general and specific purposes manifested on the face of the ICRA and in its legislative history as were discussed in prior sections. Congress recognized that tribal sovereign immunity was one of the basic problems giving rise to the need for the ICRA. The Senators knew very well that enactment of the ICRA would be a federal limitation on tribal sovereignty.

In considering sovereign immunity, one must distinguish between actions such as this one, seeking equitable relief against the future conduct of a government violating basic constitutional rights, from others, particularly actions seeking damages for past wrongs. *Ex parte Young*. Defendants ignore this distinction, but many of the evils they claim would follow from ICRA jurisdiction would be consequences of money judgments. The remedy represented by *Ex parte Young* has long been a basic rule of constitutional law. In light of this and the intent of Congress in enacting the ICRA, Congress cannot have intended to exclude traditional equitable relief.

The standards of 25 U.S.C. §1302(8) are the same as their constitutional counterparts, a conclusion supported by the legislative history of the ICRA. The Senate Sumcom-

mittee deliberately rejected a weaker standard of equal protection. Also, defendants' suggested weaker standard of "even-handed application" is at odds with equal protection precedent and with other terms of the ICRA, and it would lead to absurd results. The legislative history also suggests that Congress may have intended by the Act to resolve the possibility of direct application of the Constitution to the tribes, again supporting use of constitutional standards.

Application of equal protection and due process standards to an Indian tribal context will and should differ from federal and state contexts. This view is supported by decisions of this Court sustaining laws applying only to Indians against fifth and fourteenth amendment challenges, where the classification was held justified by the historical and legal status of the tribes. The equal protection clause requires that a governmental classification significantly further a legitimate governmental purpose. This requires a determination that the government's means be substantially related to its ends, and a judgment about the relative importance of the individual and governmental interests at issue. The former inquiry does not interfere with any justifiable interests based on tribal culture. On the other hand judgments about the relative importance of the interests will in some cases involve distinct social or cultural standards. Tribes should have the opportunity to show that a particular individual right should be viewed as less important in the tribal context, and individuals should have a chance to show the opposite. Tribes should also be able to show that denial of very important rights is justified as incompatible with their separate political status. Racial affinity to a tribe is a justifiable tribal classification, while tribal rules favoring whites over blacks would not be.

Due process analysis is similar. Conclusive and irrebuttable presumptions which burden important personal

liberties deny due process. Such presumptions deny individuals the basic opportunity to be heard on important questions of liberty and property. Again, justifications unique to the tribal context may be shown.

The 1939 Ordinance penalizes Julia Martinez in her choice of a spouse in a way that her male counterpart is not, and she is prevented from passing her house and land use rights to her children. The Martinez children suffer ancestry discrimination — male line versus female line. At present this denies them all political rights and the chance to obtain a land use permit to make a permanent home. They can stay on the Pueblo only by residing with their mother or other member relatives. In the future they face the prospect of being forced to leave their cultural homeland. The unique interest of persons raised in a lawfully separate culture and society should be deemed fundamental in an Indian tribal context. The very cultural and religious values espoused by defendants support this contention. Defendants claim that the Ordinance is based on fathers passing on the culture. If so this is a conclusive presumption which the Martinez children are not permitted to rebut. The Ordinance denies plaintiffs extremely important personal rights and liberties, and defendants bear a heavy burden of justification.

Defendants at trial attempted to justify the 1939 Ordinance as necessary to preserve Santa Clara religion and culture. The trial court found the Ordinance to be unrelated to the religion, and the evidence strongly supports this finding. The trial court's views on cultural evidence were equivocal, but more importantly it ruled that it would not judge the cultural issue. However, it is defendants who claim a cultural justification; plaintiffs sought only to refute the claim. The district court's nontraversable plea of cultural nexus would immunize every tribal action from the ICRA.

In practice the 1939 Ordinance not only excludes the Martinez children, it mandates the membership of their male-line counterparts without regard to religious or cultural affinity to the Pueblo. The record shows that male-line children of half or less Indian ancestry, raised away from the Pueblo and knowing nothing of its language, culture, religion, or traditions, are made members by the Ordinance.

Defendants purported to be concerned about cultural outsiders, but the effect of the Ordinance is not to exclude them. The Martinez children are persons within the cultural group who have been allowed to develop a substantial stake in the life of the tribe. The actual purpose of the Ordinance was to hold down tribal membership to enlarge the shares of money and land for members, which purpose could have been accomplished without resort to discrimination. Racial affinity to the tribe and thus mixed marriages are legitimate tribal interests, but the Ordinance is a wholly arbitrary and irrational response thereto. This dispute is not over the legitimacy of the Pueblo's claimed purposes to maintain Santa Clara religion and culture; it is over the means chosen to promote those ends, which not only fail to serve them but are counter-productive.

The district court's finding that the Ordinance is rooted in certain traditional values is a wholly inadequate justification. Tradition alone cannot justify violation of the ICRA. The district court's findings that the Pueblo was traditionally patrilineal and patrilocal are shown by the evidence to be the same kinds of male dominance common to American society and to most societies. The tie between these traditions and the Ordinance is extremely tenuous at best. The Ordinance was a break with tradition, whose main purpose was to limit claims to Pueblo money and land, in response to the recent phenomenon of per capita payments.

The district court's view amounts to the rule that the Pueblo has a compelling interest in any membership rule, no matter how arbitrary or trivial. In fact, the interest differs greatly according to the situation, particiularly as between cultural insiders and outsiders. The legislative history of the ICRA discloses specific concern with tribal membership and the intent to eliminate a very significant Pueblo membership tradition, that of enforced religious conformity. The entire scheme of formal, lifelong enrollment is an Anglo concept imposed on the tribes by the Bureau of Indian Affairs to control distributions of money, land and other benefits. As cultural Santa Clarans, the Martinez children would be members in the traditional oral society — only under BIA concepts are they excluded.

Defendants' argument that the immigration cases support the Pueblo is misplaced. The immigration power is a unique sovereign prerogative committed by the Constitution to Congress. Furthermore, the Pueblo here seeks to justify an action whose federal analogy is prohibited even to Congress. The Constitution forbids Congress to expel or deny rights to native-born insiders, yet that is just what the Pueblo seeks to do.

The district court's finding that the Santa Clara Pueblo was traditionally patrilineal in kinship (as opposed to surnames) is contrary to all the evidence in the record and in the literature and is therefore clearly erroneous. The finding that the Pueblo was traditionally patrilocal is contradicted by the most reliable sources on Santa Clara and is based on faulty inferences from the record; it is also clearly erroneous.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION

Plaitiffs contend that the district court had jurisdiction to award them equitable relief and that tribal sovereign immuntiy does not defeat jurisdiction. This conclusion is sup-

ported by the purpose, language, and legislative history of the Indian Civil Rights Act[1], by ICRA precedents in the lower courts, and by analogous precedents in this Court.

A. *ICRA Precedents.*

The first federal district court to construe the ICRA sustained jurisdiction to enforce the Act by equitable relief pursuant to the ICRA and 28 U.S.C. §§ 1331 and 1343(4). *Dodge v. Nakai*, 298 F.Supp. 17, 25 (D.Ariz. 1969) (Craig, C.J.). The first detailed law review analysis of the ICRA reached the same conclusion.[2] Subsequently, four circuit courts of appeals have reviewed the question, and all have sustained jurisdiction to grant equitable relief pursuant to the ICRA and 28 U.S.C. § 1343(4). *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (8th Cir. 1972); *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200, 203 (9th Cir. 1973); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1234 (4th Cir. 1974); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 933 (10th Cir. 1975). *See also, Seneca Constitutional Rights Org. v. George*, 348 F.Supp. 48, 50 (W.D.N.Y. 1972).

The courts have developed a rule that internal remedies within the tribal government must usually be exhausted as a condition to federal court jurisdiction. *E.g., O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973). However, the district court here ruled that plaintiffs had exhausted all tribal remedies within the Santa Clara Pueblo, and this ruling is not challenged in this Court. 402 F.Supp. at 10-11, Pet. 10a-11a.

The same four circuit courts rejected the argument that tribal sovereign immunity defeats federal court jurisdiction and ruled that the ICRA was intended to limit tribal im-

[1]The statute under review, 25 U.S.C. §§ 1301-03, has been referred to as the Indian Civil Rights Act (herein ICRA) and the Indian Bill of Rights, and both terms are used interchangeably in this brief.

[2]Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343, 1371-73 (1969).

munity in cases where the Act applies. *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973); *Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975); *Johnson v. Lower Elwha Tribal Community, supra*, 484 F.2d at 202; *Crowe v. Eastern Band of Cherokee Indians, Inc., supra; Dry Creek Lodge, Inc. v. United States, supra. See also, Seneca Constitutional Rights Org. v. George, supra.*

Finally, the one other circuit court of appeals to review jurisdiction over a tribal membership case sustained federal court jurisdiction, and this Court declined review. *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973); *cert. denied*, 419 U.S. 871; *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 419 U.S. 871.

B. *Background and Purpose of the ICRA.*

The manifest purpose on the face of the ICRA is to impose enumerated standards of the Constitution on self-governing Indian tribes. The standards are taken, mostly verbatim, from the Constitution, art. 1, § 9, cl. 3 and amendments 1, 4, 5, 6, 8, and 14. The Act expressly imposes these standards on all forms of governmental action by Indian tribes, whether they be legislative, executive, or judicial in character, and on "all offices, bodies, and tribunals by and through which they are executed." 25 U.S.C. § 1301(2).

The legislative history of the ICRA involves extensive hearings beginning in 1961, yielding four hearing reports between 1961-65[3] and summary reports on the hearings

[3]Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961); Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1962); Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963); Hearings on S.961, etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965).

by the Subcommittee Staff in 1964[4] and 1966.[5] Senator Senator Ervin and other Subcommittee members introduced bills into the 88th Congress (S.3047) and 89th Congress (S.961), each of which would have imposed on Indian tribes the same limitations that the Constitution imposes on the federal government. Neither bill ever got as far as a full committee report. In 1965 the Interior Department suggested substituting an enumerated list of rights for the direct application of the Constitution. The Subcommittee accepted the Interior bill with one important change involving equal protection, which is discussed below at pages 23-24. This bill was introduced into the 90th Congress as S.1843 and sent to Committee. The Senate Judiciary Committee voted out the bill and issued the only committee report on any of these bills, S.Rep. 841, 90th Cong., 1st Sess. (1967). The full Senate unanimously passed S.1843 on December 7, 1967. 113 Cong. Rec. 35473 (1967).

Impatient with slow progress in the House, Senator Ervin also persuaded the Senate to add the full text of S.1843 as a floor amendment to H.R. 2516, which dealt with other civil rights matters and had already passed the House. The Senate Judiciary Committee had refused this amendment so its report includes comments on it only by Senator Ervin in dissent. S.Rep. 721, 90th Cong., 1st Sess. (1967). The Senate passed H.R. 2516 with the Indian rights amendment on March 11, 1968.

The House began committee hearings on the separate Indian rights bill (S.1843) and a House version (H.R.

[4]Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Summary Report of Hearings and Investigations on Constitutional Rights of the American Indian (Comm. Print 1964).

[5]Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Summary Report of Hearings and Investigations on Constitutional Rights of the American Indian (Comm. Print 1966).

15419) on March 29, 1968.[6] But on April 10, 1968, the full House passed H.R. 2516 with the Indian rights amendment.

As this summary shows, the only committee report on any of the bills leading to the ICRA is the Senate Judiciary Committee Report, S.Rep. 841, 90th Cong., 1st Sess. (1967). This report sets out the basic purpose of the Act (at page 6):

> PURPOSE OF THE LEGISLATION
>
> The purpose of S.1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.
>
> TITLE I
>
> The purpose of Title I is to protect individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. These limitations are the same as those imposed on the Government of the United States by the U.S. Constitution and on the States by judicial interpretation.

Throughout this report and the Staff Reports mentioned above,[7] the reference is uniformly to constitutional rights being imposed, and there are frequent statements that the

[6]Hearings on H.R. 15419, etc., Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968).

[7]Notes 4 and 5 above.

limitations are the same as those imposed on the federal and state governments.[8]

Plaintiffs submit that the right to judicial review is a necessary part of constitutional limitations — so much so that the above statement of purpose refers naturally to limitations imposed by "judicial interpretation." Without meaningful judicial review, the ICRA rights would be so much inferior to the rights protected by the Constitution as to contradict the statement of purpose.

C. *Equitable Remedies.*

The Indian Bill of Rights expressly guarantees the federal remedy of habeas corpus from tribal custody. 25 U.S.C. § 1303. Defendants argue that this remedy must be held to be exclusive of all others. Plantiffs contend that this argument should be rejected, because the habeas remedy would not fulfill many of the manifest purposes of the Indian Bill of Rights; it would not fulfill specific purposes indicated by the legislative history; there is no indication that Congress intended habeas to be the sole remedy; this Court has generally sustained remedies in analogous civil rights cases; and habeas has long been a statutory remedy while equitable relief has not.

Many of the rights enumerated in the Indian Bill of Rights would rarely, if ever, arise in the context of tribal custody. Taking of property; taxation without due process; warrantless searches; bills of attainder; denial of equal rights to vote, or of freedom of the press, or of the right

[8]The Senate Subcommittee Staff expressly recommended legislation ". . . designed to insure that Indian citizens receive the inalienable rights guaranteed to all citizen of this country." They recommended that "[t]he constitutional rights and protections conferred upon American citizens should be made applicable to American Indians in their relationship with their tribal governing bodies." 1964 Subcommittee Staff Report of Hearings, *supra*, n.4, at page 23. *See also*, 1966 Subcommittee Staff Report of Hearings, *supra* n.5 at p. 5; Hearings on H. R. 15419, etc., *supra* n.6 at p. 17.

of peaceable assembly, or of the right to petition for redress of grievances, or of free speech — all frequently or exclusively occur absent custody. Even criminal procedural rights can be denied in proceedings ending in non-custody punishments such as a fine, restitution, loss of land use rights, or banishment from the reservation.[9] The ICRA would be an empty undertaking indeed if these rights were unenforceable.

As noted above, the general purpose of the Indian Bill of Rights was to give Indians under tribal jurisdiction the same constitutional rights that other Americans enjoy under the state and federal governments.[10] Since other Americans have access to equitable remedies for non-custody violations of rights, denial of equitable remedies against tribes would not be the same, it would be greatly inferior.

More specifically, the legislative history indicates the intent to alter the legal effect of prior federal court decisions denying a remedy to persons denied basic rights in non- custody circumstances. As previously stated, there is only one committee report on the bill which became the ICRA or any of its predecessors. This report discusses the "Denial of rights by tribal governments" principally by discussing seven reported federal court opinions which had denied a remedy to persons under tribal jurisdiction.[11] Five of these seven were civil cases, where a habeas remedy would not apply. One of these was *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, a dispute over tribal membership dismissed by the federal

[9]Loss of land use rights and banishment are punishments which have been used by Indian tribes. *See* discussion below at pages 41-42.

[10]*See* discussion at pages 13-14.

[11]S.Rep. 841, 90th Cong., 1st Sess. (1967), pp. 9-10. The Report also discusses an eighth federal case, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), in which a federal court *granted* a remedy in a criminal case against Indian tribal custody.

courts for want of jurisdiction. Two others, *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), and *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954), were claimed denials of the right of free exercise of religion, again dismissed by the federal courts for want of jurisdiction. The other two civil cases involved tribal power to tax. *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932, was a challenge by non-Indians to a tribal tax; it raised fifth and fourteenth amendment questions. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), was a challenge by Indians to a tribal tax. The case also involved challenges to criminal convictions by two Indians; only one conviction involved a jail sentence. In referring to both *Barta* and *Iron Crow*, the Senate Committee Report expresses concern over due process requirements in taxation.[12]

The focus on these cases was not confined to the Committee. When the bill (S.1843, 90th Cong.) was introduced into the Senate, Senator Ervin inserted an analysis of the same seven cases into the Congressional Record. 113 Cong. Rec. 13474 (1967). The same cases were also pointed out to the House Subcommittee in its hearings just prior to enactment of the ICRA.[13]

By contrast, there is no support in the legislative history for an intent to confine all remedies for rights violations to habeas corpus. Defendants are correct when they say that the hearings generally emphasized criminal proceedings rather than civil ones (though they exaggerate the degree of emphasis). But the Judiciary Committee Report does not do that, and even the hearings and Staff summaries do not anywhere emphasize criminal proceedings culminating in a jail sentence over other proceedings. It is natural to be

[12] *Id.* at 10.

[13] 1968 House Hearings, *supra* note 6, p. 17.

somewhat more concerned as a general matter about rights of the accused, but this hardly negates concern over other rights.

The general rule regarding equitable remedies for constitutional violations was stated in *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute [28 U.S.C. § 1331] provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the the wrong done.

See also, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971) and 403 U.S. at 400 (concurring opinion of Justice Harlan discussing equitable remedies); *Ex parte Young*, 209 U.S. 123, 163-65 (1908) (discussed further below at pager 19-22).

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court reviewed 42 U.S.C. § 1982, declaring equal rights to property ownership. Despite the lack of an explicit method of enforcement in the statute, the Court found federal district court jurisdiction to grant equitable relief pursuant to the statute and 28 U.S.C. § 1343(4). 392 U.S. at 412 n.1, 414 n.13. The statute in that case did not specify who was being limited by it, nor did it directly apply verbatim constitutional language. By contrast the Indian Bill of Rights is quite specifically imposed on Indian tribes and embodies rights directly taken from the Constitution.

The equitable power of the federal courts described by this Court in the cases just cited has traditionally been characterized as an inherent power of the courts exercised in accordance with principles of equity evolved from the chancery courts. Congress has recognized this by occasionally acting to limit the power. *E.g.*, 28 U.S.C. §§ 1341, 2283. By contrast, habeas corpus has for many years been governed by statute. 28 U.S.C. §§ 2241-55. The Constitution (art. I, § 9, cl. 2) limits Congress' ability to control the writ, but the practice of defining the remedy by statute is well established. Congress followed this practice by including in the ICRA a statutory right of habeas corpus. 25 U.S.C. § 1303. This section also substitutes for the constitutional limitation itself, to which the tribes may not be subject. In light of these traditions, congressional intent to deny normal equitable remedies should not be implied from a habeas statute absent the clearest indications.

D. *Tribal Sovereign Immunity.*

Tribal sovereign immunity as a bar would defeat the same general and specific purposes manifested on the face of the Indian Bill of Rights and in its legislative history, as discussed in the previous two sections. It would undermine the intent to afford persons under tribal jurisdiction the same constitutional rights as others. On this basis, the circuit courts have held the Indian Bill of Rights to set aside tribal immunity in cases where it applies.[14]

The legislative history supports the view of the circuit courts. The sovereign immunity of the tribes was repeatedly referred to as one of the basic problems giving rise to the need for the legislation, and there is repeated reference to federal authority to limit tribal sovereignty. For example, the 1966 Subcommittee Staff Report of Hearings begins with a two and one-half page discussion titled, "Tribal Sovereignty and Its Limitation by Federal Authority."[15] *See also* the Senate Committee Report's discussion of the same subject.[16] It is clear that the Senators knew full well that the very enactment of an Indian Bill of Rights would be a federal limitation on tribal sovereignty.

[14]Cases cited above at page 11.

In considering a claim of sovereign immunity, it is important to distinguish between actions such as this one, seeking equitable relief against future conduct of a government violating basic constitutional rights, from others, particularly actions seeking damages from the governmental treasury for past wrongs. (Plaintiffs here do not seek damages.) The judicial power of the United States has long been held to extend to actions for equitable relief from the future unconstitutional acts of governmental officers. *Ex parte Young*, 209 U.S. 123 (1908); *cf.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). By contrast actions for money judgments (or even equitable restitution) for past wrongs have required explicit waivers of immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974). Actions involving title to property and certain kinds of contract rights involve still other precedents. *E.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *United States v. Lee*, 106 U.S. 196 (1882).

Defendants and their *amici* ignore these distinctions.[17] However, many of the negative consequences they claim would follow from a ruling that the Indian Bill of Rights limits tribal immunity must be recognized as consequences only of money judgments against tribes. *E.g.*, Pet. 19. Plain-

[15]1966 Staff Report, *supra* n.5, at pp. 1-3

[16]S.Rep. 841, 90th Cong., 1st Sess., pp. 7-8 (1967).

[17]Many of the precedents they cite for tribal sovereign immunity were actions seeking money judgments against tribes. *E.g.*, United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940). All the general law precedents they cite on the standards for waiver of immunity were actions for money judgments. *E.g.*, United States v. King, 395 U.S. 1 (1969).

tiffs submit that actions against tribes for damages present quite different issues from this case.[18]

It is true that federal judicial power to grant equitable relief from the unconstitutional acts of governments has traditionally been exercised in actions against the appropriate governmental officer rather than against a state or the United States by name. The ostensible theory is that a government official's unconstitutional acts are not the acts of the government and thus not shielded by sovereign immunity. *Ex parte Young, supra.* However, this theory has long been recognized as a fiction, since the officer-defendant acts pursuant to his official authority, and the effect of equitable relief is generally the same as if the government itself were a party.[19] Also, the fiction is recognized as in deference to the eleventh amendment where the states are concerned and to the constitutional status of co-equal branches of government where the federal government is concerned.[20] Congress has recently expressly recognized the artificiality of the situation by amending the Administrative Procedures Act to allow the United States to be named as a defendant in actions arising thereunder.[21] Congress did this in recognition that "[a]ctions challenging official conduct are intrinsically against the United States and are now treated as such for all practical purposes."[22] Also in recent years states have often defended on the merits federal court actions for equitable relief naming the state as a defendant.[23] Those cases are tacit recognition of the practical effect of *Ex parte Young*.

[18]No circuit court of appeals has yet sustained a money judgment against an Indian tribe under the ICRA; the decisions cited above at pp. 10-11 involve equitable relief.

[19]C. Wright, Law of Federal Courts, p. 186 (2d ed. 1970); 3 K. Davis, Administrative Law Treatise § 27.03, p. 553 (West 1958).

[20]*Id.*

[21]Pub. L. 94-574, 90 Stat. 2721 (1976).

[22]H.Rep. 94-1656, 94th Cong., 2d Sess. p. 11 (1976).

[23]*E.g.*, Sosna v. Iowa, 419 U.S. 393 (1975); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

All four of the circuit courts sustaining jurisdiction to grant equitable relief for ICRA violations have allowed the entry of such judgments against tribes by name.[24] Both lower courts in this case did the same. The issue in this context has not been contested in prior cases (nor has it been in this case), but there has been discussion of the difference in parties in a few cases.[25] Although plaintiffs named both the Pueblo and its principal executive officer as defendants, plaintiffs contend that the Pueblo is a proper party defendant. The Indian Bill of Rights by its terms is a limitation on all governmental powers possessed by Indian tribes and on all tribal "offices, bodies and tribunals." The tribes are constitutionally subject to the direct and plenary control of Congress (as defendants concede, Pet.Br. 11); neither the eleventh amendment nor the constitutional status of a co-equal branch of the federal government requires the fiction of *Ex parte Young*. The only effect of applying the fiction to ICRA cases is to force litigants to select which officers to sue, a process bearing no relation to the merits of an action. The ICRA is sufficient authority to enter judgments against the tribes by name, which the lower courts have correctly allowed.

The right to redress against overbearing and unconstitutional government action represented by *Ex parte Young* has long been a basic rule of constitutional law. As Professor Wright states, "[T]he doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law."[26] In light of this well-established principle, and of Congress' clear intent to guarantee to persons under Indian tribal jurisdiction the "same" rights as

[24]*See generally* cases cited above at pages 10-11.

[25]*E.g.*, Means v. Wilson, 522 F.2d 833, 841 (8th Cir. 1975); Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 934-35 (10th Cir. 1975).

[26]C. Wright, Law of Federal Courts, p. 186 (2d ed. 1970).

other Americans and to remedy the injustice of prior cases denying relief in non-custody cases, it is inconceivable that Congress did not intend traditional equitable relief to be available.

E. *Conclusion.*

For the reasons stated in the sections above, this Court should sustain federal court jurisdiction to award equitable relief against Indian tribes and their officers for violations of the Indian Bill of Rights.

II. PLAINTIFFS SHOULD PREVAIL ON THE MERITS

Defendants and their *amici* make two kinds of arguments on the merits: they contend that 25 U.S.C. § 1302(8) is a different (and weaker) standard than the corresponding fourteenth amendment standards; and they contend that even if the standard is the same, the 1939 Ordinance furthers valid governmental interests of the Tribe. Plaintiffs disagree with both propositions. However, as set out below, plaintiffs agree that application of these standards in a tribal context will differ from application in a state or federal one.

A. *Section 1302(8) Embodies the Same Standards as the Constitution.*

The due process clause of § 1302(8) is worded the same as the federal and state equivalents. The equal protection clause of § 1302(8) is virtually the same as that of the fourteenth amendment, but one word is different. The fourteenth amendment guarantees equal protection of "the" laws, while § 1302(8) guarantees equal protection of "its" [the tribe's] laws. Two *amici* briefs attempt to make something of this difference, though it is uncertain what their standard is.[27] Since we are here concerned with both a tribal legislative standard and tribal enforcement of it, the literal

[27]Br. of National Tribal Chairmen's Ass'n. 15; Br. of Confederated Tribes of Colville Reservation 14.

terms of § 1302(8) are satisfied in any event. But the legislative history indicates that the changed word has little if any significance. In the sole committee report on the bill which became the ICRA and twice in describing the bill on the floor of the Senate, the sponsors used the phrase "the laws" to explain the meaning of the statutory phrase "its laws."[28]

Furthermore, as noted above the legislative history is replete with indications that constitutional standards were being applied to the tribes.[29]

The history of equal protection in the bills leading to the ICRA is not without interest. As noted above,[30] Senator Ervin introduced bills imposing constitutional limitations on Indian tribes in three successive Congresses. The bills in the 88th (S.3047) and 89th (S.961) would have imposed on the tribes those constitutional restrictions that limit the federal government. This would include the fifth amendment, which has no equal protection clause, although it has been held to impose equal protection limitations.[31] The Interior Department then offered an enumerated list of rights as a substitute, and the Senate Subcommittee accepted this recommendation with one exception: equal protection. The Interior bill included a provision prohibiting the denial of equal protection to "members of the tribe" only. The Subcommittee changed this to "persons" in the bill which became the ICRA.[32]

[28]The report is S.Rep. 841, 90th Cong., 1st Sess. (1967); compare the bill's text at p.2 with the explanation at p. 14. The bill was introduced on May 23, 1967, 113 Cong. Rec. 13473 (1967); compare the bill's text at p. 13473 with the explanation at p. 13475. It was discussed again on December 7, 1967, the day it passed the Senate. Compare the bill with its description at 113 Cong. Rec. 35474 (1967).

[29]*See* discussion above at pp. 13-14.

[30]*See* discussion above at p. 12.

[31]*E.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

[32]D. Burnett, An Historical Analysis of the 1968 Indian Civil Rights Act, 9 Harv.J.Leg. 557 at 602 n. 239 (1972).

This history refutes an extremely misleading suggestion made in three *amici* briefs.[33] They quote without explanation the 1966 Summary Report of the Senate Subcommittee, which states that the Interior Department's bill differs from the fourteenth amendment's equal protection clause "in some respects."[34] However, the quoted language refers to the Interior Department's draft bill prohibiting the denial of equal protection only to "members of the tribe." This language of course differs from the fourteenth amendment. But the Senators rejected this more limited language and substituted "persons" in what is now § 1302(8), making it virtually identical to the fourteenth amendment.[35] One commentator termed this a "critical point."[36]

Since plantiff Julia Martinez is a Pueblo member, even the Interior bill would have protected her. But the history above demonstrates that the Senate Subcommittee made a deliberate decision to reject a more limited equal protection clause, even as it carefully omitted the fifteenth amendment and the first amendment anti-establishment clause from the ICRA out of deference to the tribes.

Defendants and their *amici* suggest one concrete version of a weaker equal protection standard, that § 1302(8) should require no more than so-called "even-handed application" of existing tribal law. Pet. 27. The opinion of the district court suggests the same standard. 402 F.Supp. at

[33]Br. of National Tribal Chairmen's Ass'n 18-19; Br. of Pueblo de Cochiti, *et al.*, 5; Br. of Confederated Tribes of Colville Res. 15.

[34]1966 Summary Report of Hearings, *supra* n.5, p. 25.

[35]The Report's language was erroneously cited by an earlier panel of the Tenth Circuit, which also failed to note that the language applied to a rejected version of the equal protection clause. Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). The error in that opinion is then quoted, again in error, in White Eagle v. One Feather, 478 F.2d 1311, 1313 (8th Cir. 1973) and in Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975). The mischaracterization of this language should go no farther.

[36]D. Burnett, *loc. cit. supra* n. 32.

17; Pet. pp. 24a-25a. However, this "standard" bears no relationship to the purposes of the equal protection clause. This merely amounts to an arbitrary division between differential treatment of persons by the administrative organs of a government as opposed to the legislative organs. According to this "standard," an individual can challenge administrative classifications, but legislative ones are immune. There has never been such a line drawn in equal protection analysis. In fact, administrative differentials can be sustained, just as legislative ones can be struck down. The equal protection clause protects against invidious discriminations by all branches of a government. This is expressly codified in the ICRA, which by its terms limits "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial." 25 U.S.C. § 1301(2).

Of course there are occasions where a legislative classification is justified because it significantly furthers a legitimate governmental purpose, but uneven administration of the same rule would not be justified. *E.g., Daly v. United States*, 483 F.2d 700, 705-06 (8th Cir. 1973). However, this situation can be reached only *after* a legislative differential is found to be justified. Immunity of all legislative rules would completely undermine the purposes of the equal protection clause. The most arbitrary discriminations can be embodied in a legislative standard. A tribal statute forbidding the vote to left-handed persons could not violate equal protection so long as consistently applied. Congress cannot possibly have intended such an empty undertaking.

One other consideration should bear on interpretation of 25 U.S.C. § 1302(8). As defendants point out, there is a line of precedent holding that the specific provisions in the Constitution limiting federal and state governmental actions are not direct limitations on Indian tribal governments. The leading case is *Talton v. Mayes*, 163 U.S. 376

(1896), which held the fifth amendment's requirement of indictment by grand jury inapplicable to the Cherokee Nation in Indian Territory. However, as the Court noted in the *Talton* decision itself, this was at a time when most Bill of Rights guarantees had not been directly applied to the states either. 163 U.S. at 382.

A different version of this issue was presented by the non-Indian territories. In *Downes v. Bidwell*, 182 U.S. 244 (1901), a sharply divided (5-4) Court ruled that the Constitution does not *ipso facto* apply to acquired territory until and if Congress applies it by statute, although when Congress does so, the decision is irrevocable. This ruling is part of the "incorporation" doctrine regarding the status of territories. But even the majority opinion acknowledged that the inhabitants of such "unincorporated" territories are entitled to certain "natural" or "personal rights," including rights "to due process of law and to an equal protection of the laws." 182 U.S. at 282. *See also, Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903) and *Dorr v. United States*, 195 U.S. 138 (1904), stating in dictum that "fundamental" rights are protected by the Constitution "wherever the jurisdiction of the United States extends." 195 U.S. at 148.

This Court has never ruled on a case presenting the question whether an Indian tribal government can deny any person within its jurisdiction rights deemed fundamental whether or not all the specific constitutional limitations apply to the tribes. *Talton v. Mayes, supra*, is not such a case. The Court of Appeals in *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), distinguished *Talton v. Mayes, supra*, and expressed doubt about the inapplicability of the Constitution to Indian tribes. 342 F.2d at 377. *Cf., Marsh v. Alabama*, 326 U.S. 501 (1946).

The legislative history of the ICRA indicates that Congress was aware of the *Colliflower* decision when it deliber-

ated the bills leading to the ICRA. *Supra* n. 11 and accompanying text. The enactment of the ICRA may well have resolved future extensions of the *Colliflower* ruling under the Constitution itself.

Plaintiffs have not sought relief under the Constitution itself and do not do so now. But they do contend that Congress' awareness of the question of fundamental constitutional rights of persons under the jurisdiction of Indian tribal governments, focused by the *Colliflower* decision, is further evidence that Congress intended the Indian Bill of Rights to be closely patterned after the Constitution itself. The contrary conclusion would render Congress' effort to resolve the *Colliflower* problem ineffective. *Cf.*, Note, 82 Harv.L.Rev. 1343, 1346-53 (1969).

B. *Equal Protection and Due Process Review in a Tribal Context.*

Although the legal standards of 25 U.S.C. § 1302(8) are the same as their fifth and fourteenth amendment antecedents, application of these rules in the context of an Indian tribe with distinct cultural traditions and social organization will and should differ from the federal and state contexts. This view is directly supported by decisions of this Court sustaining laws singling out Indians for separate treatment against fifth and fourteenth amendment challenges. *United States v. Antelope*, — U.S. —, 51 L.Ed.2d 701 (1977); *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). These decisions hold that laws dealing only with Indians are justified by the historical and legal status of Indian tribes as separate peoples entitled to self-government. These decisions also indicate that, contrary to the warnings of defendants and their *amici*, the equal protection clause poses no threat to legitimate tribal interests.

The equal protection clause requires that differential treatment by a government must significantly further a legitimate governmental purpose. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-76 (1972). A body of precedent has developed defining certain individual interests as fundamental, and classifications infringing such interests bear a greater burden of justification. *Id.* Thus, equal protection analysis requires both a determination whether the claimed governmental interest is in fact significantly served by the rule at issue, and a judgment about the relative importance of the individual and governmental interests involved. For example, in a sex discrimination case the Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, — U.S. —, 50 L.Ed.2d 397 (1976).

Plaintiffs submit that the inquiry whether the government's means are substantially related to the government's ends does not interfere with any justifiable interest based on a differing culture and society. On the other hand, judgments about the relative importance of individual and governmental interests will in some instances involve distinct social or cultural standards. Given the purpose of the ICRA to guarantee basic rights, non-Indian precedents defining fundamental rights cannot be ignored in examining a tribal rule. But tribes should have the opportunity to demonstrate that a particular individual right should be viewed as less important in the tribal context. Individuals should have the opportunity to show the opposite. Tribes should also be able to show that denial of a very important right is nevertheless justified because it is incompatible with the separate political status of the tribe. Racial affinity to a tribe is, for example, a clearly justifiable basis for a tribal classification, while a tribal classification favoring whites over blacks would not be justified.

Application of the relevant form of due process analysis is similar. The Court has held that conclusive and irrebuttable presumptions which burden important personal liberties deny due process of law. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). One of the basic concepts of due process is the opportunity to be heard on important questions of liberty and property, and conclusive, irrebuttable presumptions deny that opportunity. *Id.* As in equal protection analysis, the government's interest in maintaining the rule at issue is to be considered. *Id.* Here again, Indian tribes should have the opportunity to show that an interest deemed very important in due process precedent should be less so in the tribal context, and individuals should have the chance to show that interests not recognized as important elsewhere are fundamental in the tribal context. And the unique tribal interest in separate status should be recognized as a justification.

Plaintiffs contend that application of this analysis to the facts of this case clearly demonstrates that the 1939 Ordinance is not justified by any legitimate interests of the Santa Clara Pueblo.

C. *Constitutional Precedents Regarding the Rights of Plaintiffs Denied by the Ordinance.*

The 1939 Pueblo Ordinance discriminates against plaintiff Julia Martinez on the basis of her sex. She is penalized in her choice of a spouse in a way that her male counterpart is not, and she is prevented from passing her house and land use rights to her children. 402 F.Supp. at 14-15, Pet. 17a-19a. Sex discrimination has been found to deny equal protection in a variety of contexts.[37] Also, "[t]his Court has

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[37]Califano v. Goldfarb, — U.S. —, 51 L.Ed.2d 270 (1977); Craig v. Boren, — U.S. —, 50 L.Ed.2d 397 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971).

long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause . . .". *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 639.

The Ordinance's impact on the Martinez children is extremely grave. They are discriminated against on the basis of ancestry — male line versus female line. There are no precedents concerning this form of ancestry discrimination, though other forms have been frequently invalidated, *e.g., Hernandez v. Texas,* 347 U.S. 475 (1954); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). The present consequences of this discrimination deny the Martinez children the right to vote, considered fundamental because "preservative of all rights,"[38] and other political rights. They are denied the chance to obtain a land use permit to make a permanent home, and they can stay in the Pueblo only by living with their mother or other relatives who are members. Pueblo Const. art. VII, A. 6-7; 402 F.Supp at 14, Pet. 18a.

The likely future consequences are far more serious. Only members have the right to remain in the Pueblo. Pueblo Const. art. VI, § 1, cl. 5; A. 4. The Martinez children are in a most precarious situation. Should their mother predecease them and no other member relative take them in, they will have no place to live in the Pueblo and be forced to leave their lifelong home. This possibility poses no ordinary threat, because of the unique language, religious, and other cultural ties they have to the Pueblo. Plaintiffs contend that this unique interest of persons raised in a lawfully separate culture and society should be deemed fundamental in an Indian tribal context. The very values and interests espoused by defendants in the cultur and religion of Santa Clara strongly support this contention. Because of such

[38]Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

values, an opinion of the Solicitor of the Department of the Interior holds that tribal membership is a fundamental right subject to the restraints of 25 U.S.C. § 1302(8). 76 I.D. 353 (1969).

Turning to due process, defendants attempted to justify the 1939 Ordinance based on the claim that Santa Clara children are customarily raised in the culture or ideology of the male parent, so that the Ordinance serves cultural preservation. Tr. 97-98. The district court did not so find, but ruled as it did "assuming" that the Ordinance is "actively destructive of the cultural identity of the Pueblo." 402 F.Supp. at 18, Pet. 26a. In any event, it is apparent that the claimed policy behind the 1939 Ordinance is based on a conclusive presumption that children raised in a family with a non-Santa Clara father will not follow the language, religion or culture of Santa Clara. The Martinez children are not permitted any opportunity to rebut this presumption. Given the important personal rights they are denied, due process precedents would invalidate this rule absent very strong justification by the government.[39]

In summary, the Ordinance denies plaintiffs extremely important personal rights and liberties. Constitutional precendents would clearly invalidate it in the federal or state contexts. Under these circumstances, plaintiffs contend that defendants bear a heavy burden of justification.

D. *Defendants' Claimed Purposes Are Not Served by the 1939 Ordinance.*

At trial the governmental interest argued by defendants was the claim that the 1939 Ordinance is needed to preserve the Santa Clara religion and culture. Tr. 78-79; *see also,* Pet. Br. 9. Plaintiffs agree that the religion and culture are indeed very important but dispute the claim that the 1939

[39]Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

Ordinance is supportive of either, or that it was intended to be.

The trial court expressly found the Ordinance to be completely unrelated to the Pueblo religion. 402 F.Supp. at 16, Pet. 21a. Defendants indirectly disagree, because they continue to allege religious importance (though they do not directly dispute the trial court's finding), *e.g.*, Pet. Br. 9. However, the evidence overwhelmingly supports the finding. It is undisputed that the Martinez children are admitted into the Pueblo religion. *Id.;* Tr. 147. Defendants' witnesses stated that the religion is not open to outsiders and that one must know the Tewa language to practice it. Tr. 167, 218-19. A religious leader of the Pueblo, Mr. Alcario Tafoya, testified to the same effect. Tr. 372. He also testified that members of the plaintiff class represented by Audrey Martinez have been initiated into the Santa Clara religion. Tr. 371. By contrast, one of the defendants' witnesses was Mr. Amarante Silva, a tribal official, whose wife is Navajo. He testified that he does not teach his children (who are, of course, members under the 1939 Ordinance) the Tewa language which is necessary to the religion. Tr. 187. Nor does he practice the religion himself. Tr. 190. Thus defendants' wholly conclusory claim that fathers are the teachers of the Pueblo religion is plainly contradicted by the facts. A widely respected published source reports that, in fact, a "prestigeful and influential older male adult" in an extended family group is the dominant influence.[40]

Turning to non-religious cultural matters, the trial court's findings are equivocal. The court found that the 1939 Ordinance was "a break with tradition" but was "rooted in certain traditional values." 402 F. Supp. at 16; Pet. 21a. But the trial court's more important view on tradition was its ruling that it would not decide whether defendants' claim

[40]E. Dozier, Factionalism at Santa Clara Pueblo, 5 Ethnology No. 2, p. 172, April, 1966 at 172-73. *See* discussion of this work below at pp. 41-42.

that the 1939 Ordinance is needed for cultural survival is true or not. 402 F.Supp. at 18, Pet. 26a. In fact, as noted above, the court was willing to assume that the Ordinance is destructive of Santa Clara culture. *Id.* Why the court felt competent to rule on the evidence concerning religion but not that concerning non-religious cultural matters is not explained, but in any event, the trial court's refusal to judge the cultural evidence was error.

In the first place, it is defendants who made the claim that the 1939 Ordinance is essential to Santa Clara culture; plaintiffs sought only to refute their claim. Tr. 78-79, 139-40. In the second place, the naked claim of a nexus with culture and tradition — a nontraversable plea under the trial court's view — can quite obviously be made in any ICRA case by any tribe.[41] There will inevitably be some cultural influence on virtually every tribal action.

Plaintiffs submit that an examination of the effect of the Ordinance and the evidence demonstrates that defendants failed to show any way in which the Ordinance furthers the end of preserving Santa Clara culture.

The Ordinance mandates the exclusion of female-line children and mandates the admission of male-line children. These rules are applied without regard to religious or cultural affinity to the Pueblo. Male-line children of half or less Indian ancestry, raised away from the Pueblo, knowing nothing of its language, culture, religion or traditions are automatically members. Actual examples of such situations appear in the record. Tr. 202, 342-43. By contrast the Martinez children have known no home but the Pueblo, speak its language, and are admitted to its ancient religion. The Court of Appeals correctly concluded: "The Tribe has

[41]States also make such claims in fourteenth amendment cases, *e.g.*, Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3rd Cir. 1974).

not shown how such an incongruous and unreasonable result fosters and promotes cultural survival." 540 F.2d at 1047, Pet. 43a.

Defendants' witnesses claimed to be concerned about cultural outsiders coming into the Pueblo. *E.g.*, Pet.Br. 28. However, as the Court of Appeals expressly noted, the effect of the Ordinance is not to exclude cultural outsiders. "The Martinez children . . . are persons within the cultural group who have been allowed to develop a substantial stake in the life of the Tribe." 540 F.2d at 1048, Pet. 45a. A law review note reasons that a tribe should have significantly less authority to expel cultural insiders than to exclude true outsiders.[42]

The intent and purpose of the 1939 Ordinance were to hold down the size of tribal membership so there would be plenty of money and land for the members. 402 F.Supp. at 15, Pet. 20a; 540 F.2d at 1047, Pet. 44a. This factor was strongly emphasized by defendants' witness at trial. Tr. 136, 155, 166, 187-88, 343-44. (The last reference is to the testimony of Mr. Pat Gutierrez, one of the signers of the 1939 Ordinance itself.) As the Court of Appeals noted, if this were the problem it was made out to be, it could have been solved without resort to discrimination. 540 F.2d at 1047, Pet. 44a.

Racial affinity to the Tribe is undoubtedly a legitimate tribal interest. It follows that mixed marriages are a valid area of concern. But the 1939 Ordinance is a wholly arbitrary and irrational response to that interest. The facts in this record make clear that this dispute is not over the legitimacy of the Pueblos claimed purposes to maintain the Santa Clara religion and culture — ends which plaintiffs themselves embrace. It is rather with the means chosen to promote those ends, means that not only fail to serve them

[42]Note, 82 Harv.L.Rev. 1343, 1363 (1969).

but are actually counter-productive. As noted above (in part II. B.), this inquiry affects no legitimate cultural interest of the tribe. This Court is not asked to decide whether the Pueblo's claimed purposes are important or not — only that the Ordinance fails to further them. For these reasons, the claims of defendants and their *amici* of undue federal court interference with the Pueblo's culture are wholly unwarranted.

E. *Santa Clara Tradition.*

As already noted, the district court did not sustain dedendants' claim that the 1939 Ordinance furthers the preservation of Santa Clara religion and culture. To the contrary, the court ruled that the Ordinance is unrelated to the religion and that the Martinez children "are, culturally, for all practical purposes Santa Clara Indians." Instead the court relied on its finding that the Ordinance is "rooted in certain traditional values." 402 F.Supp. at 16, Pet. 21a. The Court of Appeals correctly rejected this ruling as a justification for the Ordinance.

A claim of tradition cannot alone justify a tribal law; many traditions will manifestly be antithetical to the Indian Bill of Rights. The inquiry must be that discussed in the previous sections. Also, the Pueblo has not claimed that the purpose of the 1939 Ordinance was to preserve the traditions to which the district court referred. In any event, the tie between these traditions, if in fact they exist at all, and the 1939 Ordinance is extremely tenuous at best. The district court's comment that in its intent and purpose the Ordinance represented a "break with tradition" is much more accurate.

The district court found that the Pueblo "was" patrilineal in both surnames and kinship, that is, both are traced through the father rather than the mother. Plaintiffs agree that the Pueblo has been patrilineal in surnames since the Spanish conquest, but as set out in section G below, they

challenge the statement that it is patrilineal in kinship, because there is no evidence whatsoever to support the finding, and there is strong evidence to the contrary.

The district court also found that the Pueblo "was" patrilocal in residence pattern, that is, martial domicile followed the male line. For the reasons set out in section G below, plaintiffs contend that this finding is clearly erroneous.

Even if one accepts the findings, they provide no support for the 1939 Ordinance. The district court described these traditions in the past tense and stated that they "have lost much of their force." 402 F.Supp. at 16, Pet. 21a. The evidence is to the effect that they never had much force. Santa Clara Indians have for many years used Spanish surnames passed through the male line, which is of course the Spanish tradition. According to a scholarly source relied upon by defendants' expert witness, Tewa people give these names the same significance as in Anglo-American and Spanish-American societies. The family name "was compared to the Mexican patronymic as having neither more nor less significance . . ."[43] Another of defendants' witnesses, tribal elder Juan Chavarria, testified that the Tewa name given to a Santa Clara child is neither the mother's nor the father's — the custom of taking the father's name refers to the "baptismal" Spanish or English name. Tr. 223, 225-26.

Defendants' expert witness, Dr. Ellis, repeatedly equated the Pueblo tradition with those of the general American society:

> I would say that our own society is also patrilineal and at least has been up to the present, and was very much

[43]E. Parsons, The Social Organization of the Tewa of New Mexico (Amer. Anthro. Ass'n 1929) p. 38. Parsons is listed on the bibliography of defendants' expert, Dr. Ellis, as a source, R.vol.II, Pl. Ex. 1 (Tr. 255), and was relied upon by Dr. Ellis in her testimony. Tr. 246, 258.

> like the Tewa society except that religion was of more importance to the Tewas that it has been in our own society for quite a number of generations.

Tr. 246. *See also* Tr. 317-18.

One other tendency to follow the father appears in the record, but it has nothing to do with the 1939 Ordinance. (Nor was it relied upon by the district court.) For religious purposes the Pueblo was traditionally divided into the Winter and Summer People, divisions anthropologists have termed "moieties." 402 F.Supp. at 12, Pet. 14a. Each moiety conducts its own religious initiation, as explained by a Pueblo religious leader. Tr. 363-64, 370-71. Where a child's parents were of different moieties, the child's affiliation was "usually with the father's moiety but may be changed . . ."[44] However, moiety affiliation is not lineage; "it is primarily a religious grouping." 402 F.Supp. at 12, Pet. 14a. Since it is clear that the 1939 Ordinance is unrelated to the Pueblo religion, the Ordinance is not "rooted in" this tradition.

To put the claim that the Pueblo was traditionally patrilocal in perspective, one must note that mixed marriages prior to the 1930's were rare.[45] In the traditional society marriage out by either sex was frowned upon at Santa Clara, as stated by two of defendants' witnesses. Tr. 182, 216-17. Amarante Silva, who married a Navajo woman and lived on the Navajo Reservation for the eleven years after his marriage (Tr. 176), admitted that he had gone "against the rulings that the old people had." Nonetheless his children are Pueblo members. Tr. 182. In those rare cases, it is clear from the record that the children were judged on a

[44]E. Dozier, Factionalism at Santa Clara Pueblo, 5 Ethnology no. 2 p. 172 (April 1966) at 173. See further discussion of this work below at 41-42. On moiety affiliation, *see also* Tr. 367-68.

[45]R. vol. II Pl. Ex. 1 p. 29 (Tr. 255); Tr. 165, 188.

case by case basis, and there is no indication of any male-line preference. The Pueblo's own constitution codifies this standard (art. II, §1(c); A. 2), and it is supported by numerous instances from the Pueblo's own records of acceptance of female-line children prior to 1939.[46]

This history indicates that even if there were a custom for marital domicile to be set up with the husband's extended family rather than the wife's, in the vast majority of cases, this meant no more than which part of the Pueblo village the couple chose to reside in. It was not used as a basis to exclude children raised in the Pueblo. The connection between such a tradition and the 1939 Ordinance is extremely attenuated.

The traditions relied upon by the district court are forms of male dominance common to most societies. But these traditions are not what plaintiffs complain of; the Ordinance rule, itself a "break with tradition," is only "rooted in" these traditions. 402 F.Supp. at 16, Pet. 21a. Whether or not these roots have any significance, it is clear that the most important reason behind enactment of the Ordinance was the desire to limit distribution of Pueblo economic resources in the face of an expanding population. Before 1939 the Pueblo had been somewhat affluent. It had acquired substantial funds pursuant to the Pueblo Lands Act of 1924, 43 Stat. 636. R. vol. II Pl. Ex. 28 p. 2 (Tr. 335). The practice of making per capita payments to members from these funds apparently began in the 1930's. R. vol. II Pl. Ex. 23 pp. 8-9 (Tr. 335). In 1935, the Pueblo got its first formal BIA membership roll under the Constitution. Pueblo Const. art. II § 1(a); A.1. Strains soon developed over the making of per capita payments to persons on the Pueblo roll but who had moved away from the Pueblo. *See* R. vol. II Pl. Ex. 16 (Tr. 335), a 1938 document. Shortage of money is also cited in discussions about children

[46]R. vol. II. Pl. Ex. 9, 14, 17 (Tr. 335); 540 F.2d at 1047, Pet. 44a.

of mixed marriages. R. vol. II Pl. Ex. 12 (Tr. 335). A 1942 proposal was to charge a fee for recognition of children of mixed marriages. R. vol. II Pl. Ex. 15 (Tr. 335).

Thus the principal concern behind the Ordinance was economic. This concern with money shown in the Pueblo's own records is then the background for the testimony of the Pueblo witnesses which indicated that the purpose of the Ordinance was to save money and other resources. *See* discussion above in section II.D. Plaintiffs do not dispute the right of the Pueblo to control its membership in non-discriminatory ways, but this concern with the public fisc cannot justify the severe consequences to the Martinez children.

Patriarchal traditions like those found by the district court have been rejected by this Court as justifications for much milder forms of discrimination by the state and federal governments.[47] *See also, Samuel v. University of Pittsburgh*, 375 F.Supp. 1119, 1131-34 (W.D.Pa. 1974), *appeal dismissed*, 506 F.2d 355 (3d Cir. 1974), a case where the Anglo-American common law tradition of male domicile was rejected as a justification for discrimination against women. But these traditions, harmless enough by themselves, have become the excuse to exclude the Martinez children from their cultural homeland in order to make sure there is enough land and money for the male-line families — under a rule created, of course, by the all-male tribal council to benefit themselves. (*See* testimony of defendants' witness Amarante Silva at Tr. 187, expressing blatant preference for male members on purely economic grounds.)

Plaintiffs contend that these traditions do not justify the severe penalty imposed upon the Martinez family and should be rejected by this Court.

[47]*E.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

F. *Considerations Particular to Membership.*

The district court's view comes very close to immunizing the entire subject of membership from review. However, this amounts to the view that the Pueblo has a compelling interest in any membership rule, no matter how arbitrary or trivial. In fact, of course, the interest differs greatly from one situation to the next. Defendants as already noted expressed concern over outsiders influencing the culture. But the Martinez children are not by any conceivable measure outsiders. True cultural outsiders have few legitimate expectations of tribal recognition. Cultural insiders, however, have a much greater stake, and the Pueblo's interest in excluding them is much less.

A published opinion of the Interior Department holds that tribal membership is subject to the restraints of 25 U.S.C. § 1302(8). 76 I.D. 353 (1969). Additionally, the legislative history notes specific concern with a prior federal case denying an Indian a remedy in a membership dispute with her tribe.[48] The legislative history also discloses specific disapproval of a hallowed tradition of the Pueblo tribes, that of enforced religious conformity.

The district court noted that the Santa Clara Pueblo was traditionally a theocracy, where religious and political affairs are interrelated. 402 F.Supp. at 12, Pet. 14a. The same was true of the other Pueblo tribes, and some degree of this tradition remains today.[49] Pueblo theocracy involved not only an established religion, but also rigidly enforced conformity to that religion.[50] In response to Pueblo urging, Congress omitted any anti-establishment clause from the Indian Bill of Rights.[51] But Congress expressly guaranteed

[48]Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, discussed above at pp. 15-16.

[49]E. Dozier, The Pueblo Indians of North America (Holt, Rinehart & Winston 1970) p. 25; A. Ortiz, The Tewa World (U. Chicago Pr. 1969).

[50]*Id.*

[51]Note, 82 Harv.L.Rev. 1343, 1361 (1969).

the right of free exercise of religion in direct response to evidence of its denial by the Pueblos and Navajos.

An Interior Department witness testified before the Senate Subcommittee:

> I have in mind a situation which arose some years ago where a number of Indians in one of the pueblos joined the Native American Church, the "peyote" church. The rest of the community did not like that and the Governor, in effect, said to these people that they had, by joining the peyote church, lost their right to use the community land.
>
> Now, that was wholly arbitrary, unwarranted, action in my opinion.[52].

The Subcommittee heard other evidence of religious intolerance.[53] As noted above, the legislative history shows specific disapproval of two reported decisions denying Indians a legal remedy for infringements of free exercise of their religion.[54]

By imposing free exercise, Congress eliminated what remained of one of the most ancient traditions of the Pueblos. In the case of Santa Clara, the matter is fully related by Dr. Edward P. Dozier. Dr. Dozier, who died in 1971, was a member of the Santa Clara Pueblo and a doctor of anthropology. He grew up at Santa Clara and spoke the Tewa language. Tr. 258, 296. He wrote about his tribe in a 1966 article, *Factionalism at Santa Clara Pueblo.*[55]

[52]1962 Hearings, *supra*. n. 3 at p. 98.

[53]*E.g.*, 1965 Hearings, *supra*. n. 3 at p. 163.

[54]*See* discussion above at pp. 15-16.

[55]5 Ethnology no. 2 p. 172 (April 1966). Because this article is the best and most concise published description of Santa Clara Pueblo society, copies are being lodged with the Clerk for the Court's convenience. This is also done in response to defendants' reliance on a post trial, out-of-court affidavit of their chief trial witness filed with this Court. Pet.Br. 24-25 citing Br. of *Amici Curiae* in support of Certiorari of the Pueblo de Cochiti, *et al.*, App. K.

According to Dozier, nonconformity to religious requirements of the Pueblo was considered a serious wrong by the traditional society. *Id.* 175. Dissidents were dealt with by either forced expulsion or voluntary departure from the Pueblo. *Id.* 175. This "skimming off' of nonconformists left the Pueblos "oriented along traditional lines with populations restricted to those who valued communal living." *Id.* 183. During the 19th Century, the Pueblos actually declined in population, partly as a result of the alienation of nonconformists. *Id.* 175. As early as 1744, there is a reported Spanish legal case of a dissident Santa Claran expelled for nonconformity. *Id.* 175-76. Such expulsions are also discussed in E. Dozier, *The Pueblo Indians of North America*, (Holt, Rinehart & Winston 1970) at pages 82-83.

Thus traditional membership at Santa Clara involved residence at the Pueblo and rigid, religious conformity. For Santa Clara, these requirements ended with the adoption of its 1935 constitution, as the Dozier article relates.[56] But for many Pueblos, enforced religious conformity was still the rule at the time the Indian Bill of Rights was adopted.

This discussion shows that the Indian Bill of Rights intentionally eliminated one of the most significant traditional features of Pueblo membership: religious conformity. As Dozier points out, the earlier (1935) change at Santa Clara was itself brought about by the pressures of Anglo society and with the guidance of the Bureau of Indian Affairs (BIA). It is an irony that the trial court interpreted the Indian Bill of Rights to leave untouchable a rule that is essentially a "break with tradition" and is based on modern economic problems. The irony is compounded, because the population pressures that led to the 1939 Ordinance were in all likelihood generated in large part by the ending of

[56]One of the defense witnesses, Amarante Silva, illustrates the change. He testified on tradition and is a former tribal councilman but does not practice the traditional Pueblo religion. Tr. 190.

the prior practice of expelling dissidents, a practice which had previously held down the population. In other words, the 1939 Ordinance has to some extent worked as a modern substitute for outlawed religious conformity.

Plaintiffs contend that it is an irrational application of the ICRA to hold that membership rules are essentially immune from any review save unequal application, when a central intent and effect of the Act was to eliminate a much more significant membership rule. To the extent that the truly ancient ways of the Pueblo are a concern, the damage was done long before this lawsuit was filed. Making the Martinez children pay such a great penalty will not restore or preserve the old ways.

This discussion also suggests another problem with the view of the district court. The entire scheme of written, formal membership rolls is an Anglo idea imposed upon an oral society by the Bureau of Indian Affairs. The BIA and Congress have often (though in random ways) imposed membership rules upon the tribes.[57] This is usually for the purpose of distributing money or other property per capita, which was a major problem leading to the 1939 Ordinance, as discussed above. As the Dozier article relates, traditional membership involved conformity to Pueblo ways and was tied to residence within the cultural community. The 1939 Ordinance is very much an adoption of the BIA/Anglo idea of formal, lifetime membership unrelated to conformity or residence. As cultural Santa Clarans, the Martinez children would be members in the traditional society — only under BIA membership concepts are they excluded.

Defendants and their *amici* also contend that the Court of Appeals should be reversed by analogy to this Court's

[57]*See, for example,* 25 U.S.C. §§ 151-65; Wallace v. Adams, 204 U.S. 415 (1907); United States ex rel. West v. Hitchcock, 205 U.S. 80 (1907); F. Cohen, Handbook of Federal Indian Law (U.N.Mex. Reprint of 1942 ed. 1971) p. 98.

decisions in immigration cases, particularly the recent decision in *Fiallo v. Bell*, — U.S. —, 52 L.Ed.2d 50 (1977).

This contention should be rejected for two reasons.

First, the immigration laws of the United States deal with a unique sovereign prerogative, committed by the Constitution to the control of Congress. Art. 1, § 8, cl. 4; fourteenth amendment § 1. Under international law, there is only one sovereign nation within our borders, the United States of America. Under the Constitution, many of the internal powers of the United States are reserved to the states, and we often refer to states as sovereign. Similarly Indian tribes exercise internal sovereignty as permitted by federal law. But despite the internal sovereignty of the states and the Indian tribes, the external sovereign powers of the United States — such as foreign relations and foreign trade — are powers only of the national government. Immigration is such a national power. It is well settled that states cannot control immigration, *Edwards v. California*, 314 U.S. 160 (1941).

This is not to say that tribal membership is the same as state citizenship — it is obviously very different. Plaintiffs recognize that tribes have broad authority and the primary authority over their membership. Plaintiffs do not ask the courts to say what the Pueblo's membership must be — only to prohibit an invidious discrimination. But the power over immigration committed by the Constitution to Congress is also quite different from a tribe's authority over membership. Congress has complete authority to limit tribal membership and in fact has exercised that authority rather frequently to govern property transactions with tribes (see discussion above at page 43.) The question here is wholly statutory, not constitutional.

The second reason the immigration analogy should be rejected is that the Pueblo here seeks to justify an action

whose federal analogy is prohibited even to Congress itself. As noted earlier, defendants seek to deny membership and its attendant rights to children born into Pueblo society and so thoroughly a part of it that both courts below expressly found that culturally they are Santa Clara Indians. The federal analogy would be to deny citizenship and land ownership to persons born in the United States and subject to its authority, a power expressly prohibited by the fourteenth amendment § 1. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898). That section was enacted in part to overrule the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), where such a denial was sustained by this Court. In fact the immigration laws deal entirely with true aliens born abroad and seeking to enter this country and become citizens of it. At least since the fourteenth amendment § 1 was ratified, the immigration power has not been available to expel or deny rights to native insiders. Yet that is just what the Pueblo seeks to do.

G. *The District Court's Findings on Pueblo Tradition Are in Part Clearly Erroneous.*

Prior sections of this brief are based entirely on the facts found by the district court, but plaintiffs also wish to correct two erroneous facts stated in the district court's opinion. The disputed findings are that Santa Clara kinship was traditionally patrilineal and that the Pueblo was traditionally patrilocal — in other words, that kinship and domicile generally were expected to follow the male rather than the female line. 402 F.Supp. at 16, Pet. 21a. Plaintiffs do not disagree that the Pueblo has a patrilineal tradition in surnames taken from the Spanish. *Id. See* discussion above at pages 35-36.

(1) Kinship

The sole evidence that Santa Clara was traditionally patrilineal was the testimony of defendants' expert, Dr. Ellis.

While she did indeed testify that Santa Clara was patrilineal, she distinguished kinship. Her direct testimony explaining the matter appears at Tr. 242-46. She defined patrilineal at Santa Clara as taking the father's name and usually his religious moiety. Tr. 242-43. But when it came to kinship matters, she made a distinction (Tr. 245-46):

> Q. Is it your opinion that Santa Clara society is patrilineal?
>
> A. Yes, I would say it was, and I would like to add that parenthetically some anthropologists have said it was a bilateral society. In kinship terms, it is bilateral — that is, father's people and mother's people up to the grandparent generation have the same terms, they are not distinguished.

In her pre-trial paper, she states in its summary, "The fact that the Tewa have a bilateral kinship system . . . indicates a basic sense of sexual equality." R. vol. II Pl. Ex. 1 p. 32 (Tr. 255).

This point is strongly supported by the writings of Dr. Edward Dozier, previously described. Dr. Ellis testified that Dr. Dozier was her most important source. Tr. 258, 282, 296. Her pre-trial paper said the same, R. vol. II Pl. Ex. 1 p. 12 (Tr. 255), and it quotes Dozier extensively. As she pointed out, he was a Santa Clara Indian who grew up at the Pueblo and spoke the Tewa language. *Id.*; Tr. 296. He was also a doctor of anthropology and wrote three works relied on by Dr. Ellis in her preparation for this case. See the bibliography to R. vol. II Pl. Ex. 1 (Tr. 255). Two of these are published: *The Pueblo Indians of North America* (Holt, Rinehart & Winston 1970) and *Factionalism at Santa Clara Pueblo*, 5 Ethnology no. 2 p. 172 (Apr. 1966), which is lodged with the Clerk for convenience (see n. 55, *supra*). The third work is a short, unpublished paper that Dr. Dozier wrote for Dr. Ellis when he was her student at

the University of New Mexico in the 1940's. Tr. 324. This paper is in evidence at R. vol. II Pl. Ex. 2 (Tr. 323). Dr. Ellis repeatedly indicated that Dr. Dozier was the best source on Santa Clara, Tr. 282, 296, and that his three writings above are the best sources on Santa Clara today. Tr. 282.

Dr. Dozier has the following to say about Santa Clara regarding kinship:

Factionalism at Santa Clara Pueblo, supra, states at page 172:

> The essential characteristics of Tewa society and culture may be briefly summarized. Tewa kinship terms are descriptive and bilateral. The household is partially extended to include relatives on either the mother's or the father's side. There is no evidence of a lineage principle in the organization of kinship terms, in the family structure, or in the behavior of its members.

The Pueblo Indians of North America, supra, states at pages 163-64:

> The Tanoan System
>
> Tanoan [including Tewa] kinship terms are descriptive and thoroughly bilateral . . . .
>
> Behavior of kin appears to reflect terminology rather faithfully. The basic social and economic unit of the Tanoan Pueblos before recent economic changes was the bilateral extended family — a kind of minimal descent group.

This is the passage quoted with approval by Dr. Ellis in her pre-trial paper, R. vol. II Pl. Ex. 1 pp. 12-13 (Tr. 255).

The unpublished Dozier paper, R. vol. II Pl. Ex. 2 (Tr. 323), states at page 1:

> The unit of Santa Clara society is the family. Several families are further grouped by feeling of kinship but

without adherence to strictly patrilineal or matrilineal affinity into several family groups.

For these reasons, plaintiffs contend that the district court's finding that Santa Clara Pueblo was traditionally patrilineal in kinship is contrary to all evidence and thus clearly erroneous.

(2) Patrilocal

Defendants' evidence on this point is also chiefly that of Dr. Ellis, although the court relied as well on some exhibits discussed below. Of the other defense witnesses, when asked about patrilocal custom, two supported Dr. Ellis (Mr. Paul Tafoya, Tr. 115, and Mr. Naranjo, Tr. 155), while two others contradicted her (Mr. Baca, Tr. 200, and Mr. Chavarria, Tr. 209).

On direct examination, Dr. Ellis claimed a patrilocal custom for Santa Clara. Tr. 247. Her pre-trial paper and cross-examination testimony qualified this by reporting a custom to move in with the mother's family right after marriage for a short period of time. Tr. 318.

However, she squarely disagrees with her main source, Dr. Dozier. His article, *Factionalism at Santa Clara Pueblo, supra* n. 55, states at page 173 that "residence is ambilocal or neolocal." Dr. Ellis defined "neolocal" as meaning a random residence pattern. Tr. 318.

On this point, Dr. Ellis is also contradicted by Dr. Alfonso Ortiz. His book, *The Tewa World*, is also listed on Dr. Ellis' bibliography for this trial. R. vol. II Pl. Ex. 1 p. 35 (Tr. 255). Dr. Ortiz is a Tewa Indian from the San Juan Pueblo and an anthropologist. A. Ortiz, *The Tewa World* (U. of Chicago Press 1969) p. xi. Ortiz states that in Tewa society "[T]here is no clear postmarital residence rule, . . ." *Id.* p. 45.

Finally, the district court in making its finding expressly relied on 1971 and 1973 absentee voter lists for the Pueblo. 402 F.Supp. at 16, Pet. 21a. These purport to show that at those times about 60 per cent of the listed absentee voters were women. However, the court's reliance on these data is entirely misplaced. For one thing, 60 per cent is not a statistically significant figure on which to base such an absolute concept. But more importantly, these figures are for residence more than 30 years after the 1939 Ordinance had been enacted. During those years, women who married non-members had been subjected to severe discrimination and mistreatment. See the testimony of Julia Martinez (Tr. 34-76) and Floripa Northcutt (Tr. 351-58). Not only have their children been denied membership, but the Pueblo was even unwilling to assist Mrs. Martinez to obtain medical care for her gravely ill daughter. Tr. 45-51. Mrs. Martinez was denied equal access to HUD housing assistance to the Pueblo until after this suit was filed. Mrs. Northcutt, also a member married to a non-member, was denied equal use of Pueblo grazing lands on the ground of her marriage. Tr. 354. After over 30 years of suffering such indignities, it is not suprising that more women than men would be on the absentee voter rolls. Given this discrimination and the statistical preponderance of adult women over adult men in the population at large, the fact that only 60 per cent of the absentee voters are female rather supports the conclusions of both Dr. Dozier and Dr. Ortiz that Santa Clara society is neolocal. The court's reliance on such a statistic to justify the discrimination retroactively cannot be sustained.

For these reasons, plaintiffs contend that the court's finding that Santa Clara society was traditionally patrilocal is clearly erroneous.

CONCLUSION

The 1939 Pueblo Ordinance denies plaintiffs extremely important rights and liberties. The asserted justification amounts to the claim that persons who by any fair standard are completly identified with Santa Clara religion, language and culture must be excluded from Pueblo membership in order to save the culture from destruction. It is manifest that the Ordinance does not in fact significantly further the preservation of Santa Clara religion or culture. The Ordinance therefore denies plaintiffs the equal protection of Pueblo laws and denies them due process of law, in violation of the Indian Bill of Rights, 25 U.S.C. § 1302(8). For these reasons this Court is respectfully requested to affirm the judgment of the Court of Appeals.

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Respectfully submitted,

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